

DRAFT (12/11/2020)

R309. Environmental Quality, Drinking Water.

R309-405. Compliance and Enforcement: Administrative Penalty.

R309-405-1. Purpose, Scope, and Applicability.

(1) The purpose of the Division's enforcement program is to protect public health by ensuring compliance with the Safe Drinking Water Act, rules promulgated by the Board, and valid administrative orders issued by the Director.

(2) Rule R309-405 sets the procedures, criteria, and factors that apply to the assessment and settlement of formal administrative penalties against public drinking water system suppliers for violation of the Safe Drinking Water Act, Sections 19-4-101 et seq., rules promulgated by the Board, or orders issued by the Director under the Safe Drinking Water Act.

(3) Rule R309-405 applies to all public drinking water systems and suppliers under the Safe Drinking Water Act.

R309-405-2. Authority.

Sections 19-4-104, 19-4-105, 19-4-106(4), and 19-4-109.

R309-405-3. Definitions.

The following terms are defined for the purposes of Rule R309-405:

(1) "Administrative order" means any form of order issued by the Director under the Safe Drinking Water Act that requires the supplier to take an action or refrain from taking an action. Administrative orders include any order variations, including Compliance Agreement/Enforcement Order, Stipulated Consent Order, Initial New System Order, and any form of unilateral order.

(2) "Administrative penalties" are monetary sanctions imposed by the Director pursuant to Section 19-1-109 arising from violations of the Safe Drinking Water Act, rules promulgated by the Board, or lawful orders issued by the Director.

(3) "Formal enforcement" is an action initiated by the Director that is intended to result in an enforceable order or final violation finding under either administrative or civil (judicial) procedures.

(4) A "notice of agency action" is a notice issued by the Director under Section 19-4-109(4) and the Utah Administrative Procedures Act that initiates any type of formal enforcement

action that involves the assessment of administrative penalties. A notice of agency action may include a notice of violation or an administrative order in any combination where a penalty is being sought in connection with the formal enforcement matter.

(5) A "notice of violation" is a written notice signed by the Director under Section 19-4-107 stating the nature of the violation of one or more legally-binding requirements. A notice of violation may include an administrative order to correct the violation or seek a variance by a specific date. A notice of violation may be the only formal enforcement action taken or it may be used as a basis for other enforcement actions.

(6) "Respondent" is the public water system supplier or other person who is the subject of the notice of violation, administrative order, or other form of formal enforcement under this rule.

R309-405-4. Formal Enforcement Introduction; No Limits on Authority and Remedies.

Section R309-405-4 addresses administrative procedures as they apply to formal enforcement actions.

(1) Formal enforcement actions are initiated by the Director through the issuance of a notice of violation or any form of administrative order, notice of agency action, or any combination of a notice of violation, administrative order, or notice of agency action.

(2) The Director may initiate and pursue formal enforcement through administrative procedures or through judicial procedures. In lieu of initiating formal enforcement through administrative procedures, the Director may initiate formal enforcement proceedings through judicial procedures in state court under Section 19-4-109(8). Final administrative orders may also be enforced in state court through judicial procedures.

(3) Administrative penalties are intended to emphasize the need for timely, meaningful, and lasting corrective actions and to deter future violations.

(4) Nothing in Rule R309-405 should be construed to limit the Director's enforcement discretion or right to pursue any administrative or judicial enforcement actions under the Safe Drinking Water Act.

R309-405-5. Formal Administrative Enforcement Actions and Assessment of Administrative Penalties.

Section R309-405-5 addresses formal enforcement actions and

monetary penalties available to the Director through administrative procedures.

(1) Formal Administrative Enforcement Actions Seeking No Penalties.

(a) Whenever the Director issues, under the Safe Drinking Water Act, a notice of violation or administrative order (or a combined notice of violation and administrative order) that does not seek the imposition of administrative penalties, the procedures set forth in Section 19-1-301 and Rule R305-7 shall apply to the issuance and service of the notice of violation or administrative order (or combined notice of violation and order) and any adjudication arising from the issuance and service of the notice of violation or administrative order (or combined notice of violation and administrative order).

(2) Formal Administrative Enforcement Actions Seeking Penalties.

(a) Whenever the Director issues, under the Safe Drinking Water Act, a notice of violation or administrative order (or a combined notice of violation and administrative order) that seeks the imposition of administrative penalties, the notice of agency action procedures set forth in Section 19-4-109 and Subsection R309-405-5(5) shall apply to the issuance and service of the notice of violation or administrative order (or combined notice of violation and administrative order) and any adjudication arising from the issuance and service of the notice of violation or administrative order (or combined notice of violation and administrative order).

(3) Violations of Administrative Orders.

(a) If the Director seeks the imposition of administrative penalties arising from the violation of an administrative order, the notice of agency action procedures set forth in Section 19-4-109 and Subsection R309-405-5(5) shall apply to the issuance and service of the notice of agency action and any adjudication arising from the issuance and service of the notice of agency action.

(b) The Director may seek judicial enforcement or the imposition of administrative penalties without first issuing a notice of violation arising from the violation of an administrative order issued under the Safe Drinking Water Act.

(4) Administrative Penalty Range.

(a) Any violation by a public water system serving a population of more than 10,000 individuals shall be subject to a penalty of exactly \$1,000 on a per day, per violation basis.

(b) Any violation by a public water system serving a population of less than 10,000 individuals shall be subject to a penalty not to exceed \$1,000 on a per day, per violation basis, based on the criteria described in Section R309-405-6.

(5) Administrative Penalty Assessment, Payment, and Collection Procedures; Adjudications and Appeals.

(a) Prior to assessing administrative penalties under the Safe Drinking Water Act and Rule R309-405, the Director shall provide the respondent with a written Notice of Proposed Assessment of Administrative Penalties, in accordance with Section R305-7-402, and provide the respondent with the opportunity of no less than 30 calendar days to submit comments to the Director relating to the proposed penalties. The comments may include evidence of mitigating circumstances the respondent desires the Director to consider prior to assessing penalties.

(b) After considering any timely comments or evidence submitted by the respondent, the Director may decline to assess administrative penalties by providing notice to the respondent. If, after considering timely comments and evidence submitted by the respondent, the Director makes the decision to pursue the assessment of penalties, the Director shall proceed as follows:

(i) The Director shall issue a Notice of Agency Action and Demand for Payment in accordance with Section 19-4-109 and Title 63G, Chapter 4, Administrative Procedures Act, providing a detailed statement of basis for the assessed penalty, including the Director's evaluation of any comments or evidence submitted by the respondent during the comment period.

(ii) The Notice of Agency Action and Demand for Payment shall include notice of the right to a formal adjudicative proceeding in accordance with Subsection 63G-4-201(2)(a)(vi) by filing a written response within 30 days of the mailing date of the Notice of Agency Action and Demand for Payment. The adjudication of administrative penalties shall be conducted as a formal adjudication.

(iii) If the respondent does not request an adjudicative proceeding, payment of administrative penalties shall be due within 30 days of the date of issuance of the Notice of Agency Action and Demand for Payment.

(iv) If the respondent files a timely written response to the Notice of Agency Action and Demand for Payment pursuant to Section 63G-4-204, the following procedures shall apply:

(A) The Director, serving as the presiding officer, shall conduct a formal adjudication pursuant to the relevant provisions

of Title 63G, Chapter 4, Administrative Procedures Act.

(B) At the conclusion of the formal adjudicative proceeding, the Director shall issue a final order of the adjudicative proceeding, pursuant to Section 63G-4-208, as the final agency action regarding the assessment of administrative penalties.

(C) The final order of the adjudicative proceeding shall be subject to judicial review pursuant to Section 63G-4-403.

(6) Settlement.

(a) At any time during a notice of violation, administrative order, or penalty assessment or adjudication process, the Director may compromise or settle administrative penalties in accordance with Section 19-4-109(3), except that settlements that require the payment of penalties in excess of \$25,000 require Board approval under Subsection 19-4-104(1)(c)(vii).

(b) The Director's authority to compromise or settle administrative penalties includes providing payment terms and extensions of time, in the discretion of the Director.

R309-405-6. Factors for Determining Amount of Penalties.

The Director, in assessing or setting any administrative penalty (or in settling any claim for civil penalty), and the Board, in reviewing an administrative penalty settlement under Subsection 19-4-104(1)(c)(vii), may evaluate the following factors in determining the appropriate amount of the penalty:

(1) Economic benefit. The costs a person or organization may save by delaying or avoiding compliance with applicable laws or rules.

(2) Gravity of the violation. This component of the calculation shall be based on:

(a) the extent of deviation from the Utah Safe Drinking Water Act or the rules;

(b) the potential for harm to drinking water users, regardless of the extent of harm that in fact occurred; and

(c) the degree of willfulness, recklessness, or negligence including how much control the respondent had over the violation and the reasonable foreseeability of the events constituting the violation; whether the respondent made or could have made reasonable efforts to prevent the violation; whether the respondent knew, or should have known, of the legal requirements which were violated; any facts suggesting that the violation was intentional; and the degree of the respondent's recalcitrance.

(3) The duration of non-compliance.

(4) Self-disclosure of non-compliance by the water supplier.

(5) The degree of cooperation and good faith efforts to comply. Good faith takes into account the openness in dealing with the violations and promptness in providing notice, correcting violations, and avoiding potential public harm.

(6) By contrast with Subparagraph R309-405-6(5), the degree of recalcitrance, non-cooperation, or delay associated with providing notice and appropriate responses to the violations.

(7) History of compliance or non-compliance. The penalty amount may be adjusted upward in consideration of previous violations and the degree of recidivism. Likewise, the penalty amount may be adjusted downward when it is shown that the respondent has a good compliance record.

(8) Response and investigation costs incurred by the State and others.

(9) The possible deterrent effect of a penalty to prevent future violations by the respondent or other suppliers.

(10) The respondent's financial structure, revenue sources to pay penalties, financial capabilities, and ability to pay or demonstrated inability to pay.

(11) Any other aggravating or mitigating circumstances that are relevant to the matter.

R309-405-7. Financial Hardship; Penalty Adjustments.

Based on demonstrated financial hardship not previously considered under Section R309-405-6, the Director may:

(1) reduce or extend payment of an administrative penalty under the Safe Drinking Water Act and this rule; or

(2) approve a payment installment plan or allow a portion of the penalty to be deferred and eventually waived if no further violations are committed within a period designated by the Director.

KEY: drinking water, environmental protection, penalties

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